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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1190

JOHN NUCCIO, ROSARIO LUPO and
WILLIAM CURCURATO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

JOINT PETITION FOR REHEARING OF ORDER DENYING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The above named petitioners jointly pray for a rehearing of the order of this Court, made May 15, 1967, which denied their joint petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case January 5, 1967.

As stated in the certificate of counsel, *infra*, this petition for rehearing is believed to be justified by substantial grounds available to petitioners although not previously presented (Rule 58(2)).

Preliminarily summarizing those grounds: This Federal narcotics prosecution (21 U.S.C. §174), a single-count conspiracy prosecution, is believed to be unusual in that it charges simply and exclusively a conspiracy to *import* heroin, i.e., as distinct from the more common conspiracy

indictments in this area which ordinarily charge conspiracy not only to *import*, but also to *receive, conceal, sell*, etc. Since the indictment thus charges a *single, importation* conspiracy, proof beyond a reasonable doubt as to each of the within petitioners (defendants) was of course required *in those explicit importation terms of this conspiracy indictment.* When attention is focused upon this strictly importation character of the indictment, certain trial errors which we urged in the Court of Appeals—but which we unfortunately omitted from our petition for certiorari out of fear of writing too lengthy a petition—emerge as substantial, we believe.

The errors which thus emerge are: (1) The Jury should not have been instructed at all concerning the presumption of knowledge of illegal importation (21 U.S.C. §174), because the statutory presumption is simply not applicable at all in a strictly importation prosecution as such, and *a fortiori* it is not applicable in an importation-*conspiracy* prosecution; in such strictly importation cases what must be proved, without aid from any "presumption", is that each defendant did knowingly import (or, as here, conspire to import) contrary to law. (2) Since there was no proof with respect to any of our three defendants of either actual or constructive possession *of any substance actually proved to have been a narcotic drug,* the erroneous invocation of the statutory presumption was the more fatally aggrieving.

We turn now to a more detailed presentation of the points above suggested.

For convenience in making the more detailed presentation which now follows, it seems useful to formulate, in

the terms of an additional "Question Presented" in this certiorari proceeding, the following:

> [Additional proposed "Question Presented" for the purposes of this petition for rehearing]
>
> Since the case involved solely a charge of conspiracy to import narcotics, in which the Government had the burden to prove actual conspiratorial knowledge of importation, were not the petitioners denied a fair trial and due process of law by the instructions which permitted the Jury to apply the statutory presumption of knowledge of importation under 21 U.S.C. §174? Was not the prejudicial effect of such incongruous invocation of the statutory presumption made even worse by the undisputed fact that there was not even in this record any proof of possession by any defendant of a substance proved to have been narcotics? And was not the prejudice still further aggravated by the Trial Court's violation of the standards of *United States* v. *Gainey*, 380 U.S. 63, that it is "the better practice" in instructing jurors concerning this type of statutory presumption, to omit "any explicit reference to the statute itself in the charge"?

The trial proceedings which pertain to the above herein newly suggested issues are:

It will be recalled that the main prosecution witness, the French Airlines employee Henrypierre (R. 31 *et seq.*), was arrested by Customs Agents on January 29, 1965 at Kennedy Airport in New York City, while he was carrying a package concealed in his hand baggage which he said he was taking to the petitioner Curcurato, and this package contained three kilograms of heroin (R. 35-40, 44; pet. cert., Appendix 1, p. A2). It is undisputed that this package seized from Henrypierre at Kennedy Airport was not

connected up with any of the defendants, except through Henrypierre's statement that the package was intended for Curcurato. It was not, then, this package seized from Henrypierre at the New York Airport in January 1965 on which the prosecution depended for conviction of the defendants in this case, but it was the alleged prior deliveries of alleged packages of heroin which formed the basis of the prosecution's case. It is therefore important to note that the only testimony which in any way went to "prove" the alleged narcotics character of the prior packages was Henrypierre's testimony that, as compared with the package seized at Kennedy Airport, the prior packages were smaller, were wrapped in plastic and contained a white powder (R. 63-67).

Over defense objection that the package seized from Henrypierre when he was arrested at Kennedy Airport on January 29, 1965 had not been connected with any defendant, the Trial Court received that package as an exhibit in evidence subject to connection (R. 98-100).

At appropriate stages in the trial the defendants made objections or motions as follows: The admission in evidence of the package seized from Henrypierre at Kennedy airport on January 29, 1965 was objected to on the ground that the exhibit was not binding upon the defendants (R. 419-423); this point was further urged in a motion for acquittal on the ground that the Government must prove, as a material element, knowledge of importation of the narcotics; that since there was no proof of such knowledge, the Government must rely upon the statutory presumption based on possession of narcotics, and that the Government had failed to prove any such possession

because Henrypierre had testified merely that he delivered packages containing a white powder but there was no proof that it was narcotics (R. 447-448). At the completion of all of the proofs, renewed defense motions included the following (R. 511 *et seq.*). The Government had the burden of proving that each defendant had knowledge of the existence of the conspiracy, participated in the conspiracy, had a stake in the outcome of the conspiracy, and had knowledge of unlawful importation of narotics (R. 511). There was no proof of possession of narcotics because the white powder involved had not been proved to have been narcotics as of the time when Henrypierre allegedly made the deliveries (R. 511-512). It was pointed out that generally in cases of this type there is either proof of some conversation indicating that narcotics are involved, or there is proof of tests being made by the conspirators, whereas in this case there was nothing except speculation and surmise to show that the white powder was narcotics (R. 512).

Against the above trial background must be evaluated, we now submit, the fact that the Trial Judge saw fit to read to the Jury the statutory presumption provisions of 21 U.S.C. §174 (37a-38a), expressly advising the Jury that he was reading from the statute (*ibid*). We respectfully contend that it was prejudicial error to read to the Jury this statutory language, even if the case were one in which the presumption applied at all. *United States* v. *Gainey*, 380 U.S. 63. But, further, the statutory presumption could not be applied at all, either in logic or in due process fairness, to this case, because, as above urged, what the Government was required to prove in this prosecution under an indict-

ment expressly and solely charging an *importation* conspiracy, was that each defendant did so *conspire to import*. True, the Government contends that it met this burden of proof through the testimony of Henrypierre, and both of the Courts below evidently agree with the Government as to that. Nevertheless it was wrong to allow the Government to have the additional "proof", of a purely statutorily presumptive nature, to buttress as it were the alleged proof of conspiratorial importation as such. This gave the Government an unconstitutional extra advantage in building its overall corpus of "proof" in this trial. The issue of the defendants' guilt or innocence should have turned exclusively on the question of whether the Jury believed Henrypierre's testimony of an importation conspiracy; the issue should not have been additionally and improperly weighted in the Government's favor by dragging in the statutory presumption of knowledge of importation which, we repeat, had no conceivable proper applicability in this case because, again, the Government's case had to stand or fall on the adequacy of its proof of the alleged conspiracy to import, a topic to which the statutory presumption which Congress designed for cases of "possession", etc. could have no application. All of this was made even worse, in due process terms, by the fact above noted that there was not actually in this trial any proof whatever that any of the defendants ever had actual or constructive possession of any substance proved to have consisted of narcotics. In the view which the Court of Appeals took of this whole branch of the case, this last-mentioned aspect apparently assumed special importance (as it should), and it is primarily by reason of this latter feature in the opinion below that we have felt obliged to file this petition for rehearing. We

quote the pertinent portion of the opinion below (Pet. Cert., Appendix 1, pp. A11-A12, including footnote):

> "After reading the indictment to the jury, the judge also read certain pertinent provisions of 21 U. S. C. §174. He told the jury that the section 'provides that whenever a trial for a violation of this section takes place the defendant is shown to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury'; that this 'presumption' does not 'relieve the Government of its obligation to prove every material element of this case beyond a reasonable doubt'; that if the jury believed Curcurato's testimony that he never had possession, 'he doesn't owe any explanation'; and that the jury was to draw no inferences from the failure of Nuccio and Lupo to testify. While this did not follow what the Supreme Court and this court have characterized as the 'better practice' of omitting explicit reference to the statute and simply telling the jury they may draw the inference from possession unless the evidence provides a satisfactory explanation, *United States* v. *Gainey*, 380 U. S. 63, 71 n. 7 (1964); *United States* v. *Armone*, 363 F. 2d 385, 392-93 (2 Cir.), cert. denied, —— U. S. ——" (1966), it would be hypercritical to fault the judge on that account in this case. The importance of the inference permitted by the statute is in relieving the Government of what would otherwise be the necessity of coming forward with evidence of knowledge of illegal importation in every case. The present was the somewhat unusual case where, as to all defendants, the Government's proof had covered precisely that. If the jury believed Henrypierre, the defendants knew they were conspiring to deal in illegally imported narcotics; if

it didn't, there was no substantial evidence that they had conspired to deal in anything. With the bearing of this section of the statute so minimal, it would be absurd to reverse for a slight lapse from perfection in the instruction."[4]

"[4] While the only package the Government was able to subject to analysis did not come into the physical possession of any of the defendants, we adhere to our holdings in *United States* v. *Agueci*, 310 F. 2d 817, 828-29 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), that no proof of actual dealings in narcotics is required to establish conspiracy to violate the narcotics laws and that when such proof is required, as in the case of a substantive count or in order to give rise to the statutory inference from possession, 'just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence'—such as Henrypierre's admissions, the devious methods used, and the amount of money passed. Insofar as *Cook* v. *United States*, 362 F. 2d 548 (9 Cir. 1966), may be to the contrary, we do not agree with it."

Most significant in the above quotation from the opinion of the Court of Appeals is the portion in the above quoted footnote 4, where, referring to the question of whether proof of actual dealings in narcotics is required to establish conspiracy to violate the narcotics laws, the Court held that such may be proved by circumstantial evidence, and stated, "Insofar as *Cook* v. *United States*, 362 F. 2d 548 (9 Cir. 1966), may be to the contrary, we do not agree with it."

In the *Cook* case, *supra*, the Ninth Circuit squarely held that, in a narcotics conspiracy prosecution, before the statutory presumption of knowledge of unlawful importation "can come into play there must be proof that the possessed drugs were in fact narcotic drugs. We note judicially that whether or not a powder or substance is a narcotic cannot be determined by a mere inspection of its outward appearance" (362 F. 2d at p. 549).

In our case, as seen, there was no proof that any of the alleged deliveries by Henrypierre to any of the defendants, deliveries allegedly made in plastic bags containing a white powdery substance, consisted of narcotics. In these circumstances, it was more than enough by the tests of due process and under the fair and proper bounds of circumstantial evidence in Federal criminal prosecutions, for the Government to be allowed to have its case submitted to the Jury on the basis of the alleged circumstantial indications from Henrypierre's testimony as a whole that he and the defendants were allegedly dealing in imported narcotics. It transgressed all proper bounds of due process to allow the Government to have also the benefit of the statutory presumption which in turn presupposes proof of possession of a narcotic drug, when, again, there was not even any proof that any package allegedly possessed by any defendant contained a narcotic drug, and when the statutory presumption was not logically applicable anyhow because the indictment charge was directly and explicitly (and exclusively) a charge of conspiracy to import. The only properly material or relevant evidence for the proof of this latter charge was the testimony of Henrypierre. The statutory presumption had no proper place in this picture.

CONCLUSION

It is respectfully submitted that this joint petition for rehearing should be granted, and that the joint petition for certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule 58(2), i.e., "other substantial grounds available to petitioner[s] although not previously presented".

/s/ JEROME LEWIS
Attorney for Petitioners

